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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1952.

No. 268.

ALFRED VICTOR duPONT,
Petitioner,

v.

DOROTHY ELIZABETH BARTON duPONT,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Delaware.

REPLY BRIEF IN SUPPORT OF PETITION.

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE.

REPLY BRIEF IN SUPPORT OF PETITION.

We deal in this reply brief only with the specific matters in respondent's brief which seem in most urgent need of correction.

The numbers in parentheses in the headings refer to the pages where the particular subject is discussed in respondent's brief.

I. Reply to Respondent's Statement (3-5).

Respondent's statement makes it clear that she misread the opinion of the Supreme Court of Delaware, and that, but for this, would agree that review by this Court is necessary. She argues that the evidence does not necessarily show that her 1940 Texas divorce was collusive and that there was no ground of divorce in fact. However, such argument is not open to her. As we pointed out at page 4 of our Petition, the court below assumed that our factual allegations—including the allegation that respondent obtained her Texas divorce by a collusive agreement as to the existence of a cause of action—were established by com-

petent evidence (R. 435). Consequently no fact issue is raised by the Petition. Respondent's attempt to argue the facts here shows that she misconceives the basis for the decision by the court below and fears the facts which were assumed by it to be true.

II. Reply to Respondent's Argument A (5-8).

Respondent argues that the decision of the court below granting faith and credit to the collusive Texas decree does not affect any "right, privilege or immunity" of petitioner. The speciousness of this argument is shown by respondent's reliance on *County Court v. West Virginia ex rel. Dillon*, 208 U. S. 192 (1908). The Court in that case was concerned only with the validity of a state statute. This Petition presents a vastly different situation. It is not concerned with any question as to the validity of a state statute. Petitioner claims that the court below misinterpreted the Full Faith and Credit Clause and that such erroneous interpretation denied him a right and privilege under the Constitution of the United States. He therefore comes directly within the provisions of this Court's jurisdiction as provided by 28 U. S. C. sec. 1257(3). This Court made this precise distinction in *Coleman v. Miller*, 307 U. S. 433, 438 (1939) where it specifically held (307 U. S. at 438) that the rule of *County Court v. West Virginia ex rel. Dillon, supra*, was inapplicable where a right and privilege were claimed under the Constitution of the United States.

Since petitioner's claim is that the court below denied him a right and privilege protected by the Constitution of the United States, respondent's argument and discussion (Resp. brief pp. 6-8) concerning the doctrine of pre-existing rights under Texas law are irrelevant. The issue under this section is whether the court below was incorrect in holding that the Full Faith and Credit Clause *required* recognition of a divorce decree obtained by fraud and collusion as to the existence of a cause of action, not the effect of such

decree under Texas law. We showed (Petition pp. 10-13) that the Texas decree was a nullity in Texas, but, regardless of this, the Texas decree at the very least was obtained by fraud and collusion and hence by an imposition on the Texas court. There is no element of *res judicata* and there is no reason of policy that requires the giving of full faith and credit to a decree obtained in such manner.

The purpose of *res judicata* is the putting to end of litigation between two parties. Where, as here, there was no dispute between the parties to litigate, the doctrine has no application. And Texas could have no complaint if Delaware in this case refused to recognize the divorce decree, for that decree was obtained by an imposition on the Texas court of which the court had no knowledge and for which it had no means for discovering. Respondent does not meet our contention that the Full Faith and Credit Clause does not require recognition of a decree obtained in such manner. She does not even discuss it.

Respondent's discussion and argument under this point show, as much as our own, the need of review and reversal by this Court. The constitutional question presented by the present case remains obscure because it has not as yet been expressly decided by this Court.

III. Reply to Respondent's Argument B (8-10).

Respondent has conceded, perhaps unwittingly, that the Texas decree was a nullity under Texas law. At pages 9 and 10 of her brief in discussing *Smith v. Brown*, 3 Tex. 360, 49 Am. Dec. 748 Sup. Ct. (1848) she says:

> "In short, the action did not present a justiciable controversy. In that early Texas case the court quite properly refused, *sua sponte*, to pass upon a Constitutional question raised in an action which was wholly fictitious and moot."

The facts of this case are on all fours with the facts of *Smith v. Brown, supra.* There was, similarly, no cause of

action in this case. Under the assumption made by the court below that our allegations were fully established (R. 435), it is clear that there was no controversy to be adjudicated in Texas. The purported controversy "was wholly fictitious and moot," and non-justiciable.

It is difficult to see how the Supreme Court of Delaware in the face of this decision (*Smith v. Brown*) was able to conclude that judgment rendered on another feigned cause of action was in Texas not a nullity but a judicial act to which at least some respect would be paid in Texas. That holding amounts to a determination that the Texas courts would reject a fictitious cause of action when the fraud and collusion are patent, but uphold it when the fraud and collusion are clandestine and concealed. Obviously, this is not the Texas law.

Respectfully submitted,

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